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SJC-13093

COMMONWEALTH vs. MARTIN P. CURRAN.

Worcester. September 10, 2021. – December 30, 2021.

Present: Budd, C.J., Gaziano, Lowy, Cypher, Kafker, Wendlandt,  
& Georges, JJ.

Assault and Battery. Practice, Criminal, Trial jury-waived, Presence of defendant, Confrontation of witnesses, Public trial, Assistance of counsel. Due Process of Law, Presence of defendant in courtroom. Constitutional Law, Confrontation of witnesses, Assistance of counsel. Supreme Judicial Court, Superintendence of inferior courts.

Complaint received and sworn to in the Fitchburg Division of the District Court Department on March 10, 2020.

The case was heard by Christopher P. LoConto, J.

The Supreme Judicial Court granted an application for direct appellate review.

Robert Spavento for the defendant.

Michelle R. King, Assistant District Attorney, for the Commonwealth.

Rebecca Kiley, Committee for Public Counsel Services, Martin F. Murphy, Katharine Naples-Mitchell, & Chauncey B. Wood, for Committee for Public Counsel Services & others, amici curiae, submitted a brief.

BUDD, C.J. In Vazquez Diaz v. Commonwealth, 487 Mass. 336, 336, 340 (2021), we held that a suppression hearing conducted over an Internet-based video conferencing platform in the midst of the COVID-19 pandemic was not a per se violation of a defendant's rights to confrontation, presence, public proceedings, or effective assistance of counsel. Here, the defendant, Martin P. Curran, argues that his bench trial, similarly held via video conference during the same pandemic, was a violation of his constitutional rights. He did not preserve any of these claims for appeal. On September 29, 2021, we issued an order affirming the defendant's conviction and providing prospective guidance regarding virtual bench trials in criminal cases. See 488 Mass. 1051 (2021). This opinion states the reasons for that order.<sup>1</sup>

Background. In March of 2020, shortly after the Governor declared a state of emergency due to the exponential spread of COVID-19, a respiratory illness caused by a novel coronavirus, this court, pursuant to its superintendence and rulemaking authority, began to issue orders regarding court operations. See generally Vazquez Diaz, 487 Mass. at 337-338. From March 18, 2020, until July 13, 2020, we limited in-person court

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<sup>1</sup> We acknowledge the amicus brief of the Committee for Public Counsel Services, the Boston Bar Association, the Charles Hamilton Houston Institute for Race and Justice, and the Massachusetts Association of Criminal Defense Lawyers.

proceedings to emergency matters that could not be held by video conference or telephone. Nonemergency matters were conducted virtually where practicable. Beginning on July 13, we directed the trial court departments gradually to resume in-person proceedings for nonemergency matters. However, even as in-person proceedings were phased in, Massachusetts courts continued to conduct many matters virtually.

On the same day that the Governor declared a state of emergency, the defendant was arraigned in the District Court on one count of assault and battery on a family member<sup>2</sup> and one count of strangulation or suffocation, and he was held without bail after a dangerousness hearing. See G. L. c. 265, §§ 13M (a), 15D (b); G. L. c. 276, § 58A.

In August of 2020, after the defendant waived his right to a trial by jury, he received a bench trial conducted partly through an Internet-based video conferencing platform, Zoom Video Communications, Inc. (Zoom). All participants appeared in person except for the defendant and the Commonwealth's first witness (the defendant's neighbor), both of whom appeared via Zoom. The neighbor testified that she had called the police

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<sup>2</sup> Although the criminal complaint as well as the District Court docket state that the defendant was charged as a subsequent offender pursuant to G. L. c. 265, § 13M (b), it appears that the defendant was arraigned and tried pursuant to G. L. c. 265, § 13M (a).

upon observing the defendant choking the victim and ripping out her hair. The Commonwealth's second witness, the police officer who responded to the neighbor's call, testified that when he arrived at the scene, he spoke with the neighbor and observed the victim, who was shaking and missing patches of hair. The sole witness for the defense, the victim, testified that the defendant had not assaulted her on the night in question. The judge found the defendant guilty of simple assault and battery<sup>3</sup> and sentenced him to one year of imprisonment in a house of correction. The defendant timely appealed, and we granted his application for direct appellate review.

Discussion. The defendant contends that his bench trial, conducted partly via Zoom, violated several of his constitutional rights and that, as a result, his conviction must be vacated. For the reasons discussed infra, we affirm his conviction. This decision notwithstanding, we recognize that constitutional rights are implicated when court events are held remotely. See Vasquez Diaz, 487 Mass. at 341, 347. Accordingly, pursuant to our general superintendence powers, see

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<sup>3</sup> Because the Commonwealth failed to put forth any evidence that the defendant had strangled or suffocated the victim, the judge dismissed the second count of the complaint. Likewise, the judge also dismissed the portion of the first count alleging that the victim was a member of the defendant's household or family.

G. L. c. 211, § 3, we provide guidelines to be followed when remote bench trials are contemplated in criminal cases.

1. Analysis. The defendant argues that his constitutional rights to confront the witnesses against him, to be present at trial, to have a public trial, and to have effective assistance of counsel were violated by the format of his bench trial. Because he failed to preserve these claims at the time of trial, they warrant relief only if any alleged error created a substantial risk of a miscarriage of justice. See Commonwealth v. Francis, 485 Mass. 86, 106 (2020). "A substantial risk of a miscarriage of justice exists when we have a 'serious doubt whether the result of the trial might have been different had the error not been made.'" Commonwealth v. Valentin, 470 Mass. 186, 189 (2014), quoting Commonwealth v. Azar, 435 Mass. 675, 687 (2002), S.C., 444 Mass. 72 (2005). In other words, an unpreserved claim of constitutional error warrants relief only if (1) there was indeed error, (2) "the defendant [was] prejudiced by the error," and (3) "it [would] be reasonable to conclude that the error materially influenced the verdict [or finding]." Commonwealth v. Randolph, 438 Mass. 290, 298 (2002). Here, none of the defendant's allegations of constitutional error warrants relief because the defendant was not prejudiced materially by any alleged error. We therefore discern no substantial risk of a miscarriage of justice and affirm the

defendant's conviction without reaching the merits of his constitutional claims. See Commonwealth v. Keevan, 400 Mass. 557, 565 n.5 (1987) ("even if we were to assume error . . . the conviction should stand because the record discloses no substantial risk of a miscarriage of justice"); Commonwealth v. Comtois, 399 Mass. 668, 674-675 (1987); Commonwealth v. Castro, 99 Mass. App. Ct. 502, 511 n.11 (2021).

a. Confrontation. Article 12 of the Massachusetts Declaration of Rights provides that a criminal defendant has the right "to meet the witnesses against him face to face." Similarly, the Sixth Amendment to the United States Constitution provides that a criminal defendant "shall enjoy the right . . . to be confronted with the witnesses against him."

A defendant's right to confront adverse witnesses encompasses not only the right to question those witnesses, but also the right to see and be seen by them, "face-to-face," as they testify. Commonwealth v. Bergstrom, 402 Mass. 534, 542 (1988) ("The plain meaning of assuring a defendant the right 'to meet the witnesses against him face to face' is that the accused shall not be tried without the presence, in a court of law, of both himself and the witnesses testifying against him"). See Coy v. Iowa, 487 U.S. 1012, 1017 (1988), quoting Pennsylvania v. Ritchie, 480 U.S. 39, 51 (1987) (Sixth Amendment "provides two types of protections for a criminal defendant: the right

physically to face those who testify against him, and the right to conduct cross-examination").

Citing several cases in which courts recognized that confrontation mediated through a video monitor generally is inferior to confrontation in person,<sup>4</sup> the defendant contends that his confrontation rights were violated, not because he was denied the opportunity to cross-examine witnesses, but because the video monitor denied him physical, face-to-face confrontation with those witnesses. Although we acknowledge the importance of physical, in-person confrontation at trial, we have noted that there is not an "absolute" right to this form of confrontation. Vazquez Diaz, 487 Mass. at 348.

In reviewing the defendant's unpreserved confrontation clause claim for a substantial risk of a miscarriage of justice, we must determine whether "it [would] be reasonable to conclude" that his confrontation of witnesses via video monitor rather than in person "materially influenced the [finding]." Randolph, 438 Mass. at 298. As the defendant makes no such assertion, we identify no substantial risk of a miscarriage of justice under the circumstances presented. See Francis, 485 Mass. at 106.

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<sup>4</sup> See, e.g., United States v. Yates, 438 F.3d 1307, 1315 (11th Cir. 2006); Thornton v. Snyder, 428 F.3d 690, 697 (7th Cir. 2005); United States v. Bordeaux, 400 F.3d 548, 554-555 (8th Cir. 2005); United States v. Lawrence, 248 F.3d 300, 304 (4th Cir. 2001).

b. Presence. Rule 18 (a) of the Massachusetts Rules of Criminal Procedure, 378 Mass. 887 (1979), provides that criminal defendants have the right "to be present at all critical stages" of a court proceeding. This right derives from the Sixth and Fourteenth Amendments to the United States Constitution (through their confrontation and due process clauses, respectively), as well as from art. 12. See Robinson v. Commonwealth, 445 Mass. 280, 285 (2005).

The defendant claims for the first time on appeal that his right "to be present" at his bench trial was violated because he was not physically present in the court room. As with his unpreserved confrontation clause claim, this unpreserved claim also misses the mark because the defendant has failed to point to anything about his virtual presence at trial that causes us to seriously doubt whether he would still have been convicted had he been present in person. See Valentin, 470 Mass. at 189. Rather, he erroneously assumes that a criminal defendant's appearance at trial via Zoom is necessarily inconsistent with the right to be present, see Vazquez Diaz, 487 Mass. at 343 (no per se violation of right to be present at critical stage of criminal proceeding where defendant participates virtually), and does not argue that he was actually prejudiced by his appearance in this manner at his trial.



From our own review, it does not appear that he was so prejudiced. During the trial, the defendant was able to view his attorney, the judge, and witnesses as they testified on a single monitor. See Vazquez Diaz, 487 Mass. at 342 & n.9 (right to be present "effectively safeguard[ed]" in Zoom hearing where defendant could "listen to the evidence" and "adequately observe the witnesses who testify"). There were no significant technological problems,<sup>5</sup> and the judge periodically confirmed that the defendant could hear and see the proceedings during the trial. Moreover, the District Court provided a separate room (the "Zoom room") where attorneys participating in trials from the physical court room could converse privately with clients participating via Zoom. See id. (right to be present "effectively safeguard[ed]" in Zoom hearing where defendant could "privately consult with his attorney at any time").

We therefore discern nothing about these circumstances that leaves us with a "serious doubt whether the result of the trial might have been different" had the defendant attended in person. Valentin, 470 Mass. at 189, quoting Azar, 435 Mass. at 687.

c. Public trial. The Sixth Amendment expressly grants criminal defendants "the right to a . . . public trial."

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<sup>5</sup> There were some minor technological disruptions during the course of the trial that are comparable to irregularities that routinely occur during in-person proceedings. Nothing that occurred causes us to doubt the integrity of the trial.

Because an open court room enhances both fairness at trial and public confidence in the judicial system, trials must be open to the public unless "closure is essential to preserve higher values and is narrowly tailored to serve that interest."

Commonwealth v. Cohen (No.1), 456 Mass. 94, 107 (2010), quoting Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510 (1984).

Although he did not raise the issue at trial, the defendant now claims that his right to a public trial was violated because the public could not attend his trial in person. Here, too, we discern no risk, let alone a substantial risk, of a miscarriage of justice.<sup>6</sup>

Any defendant claiming a violation of the right to a public trial has the burden to "demonstrate that the public was excluded from his trial." Cohen (No. 1), 456 Mass. at 107, quoting Commonwealth v. Williams, 379 Mass. 874, 875 (1980). Here, because the defendant's claim is unpreserved, he additionally must demonstrate that he was actually prejudiced as a result of the closed court room. See Commonwealth v. LaChance, 469 Mass. 854, 857 (2014). The defendant has not met either requirement.

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<sup>6</sup> The substantial risk of a miscarriage of justice standard applies to unpreserved claims of structural error, including an alleged violation of a defendant's right to a public trial. See Commonwealth v. LaChance, 469 Mass. 854, 857 (2014).

First, the defendant has not shown that the public was excluded. At the time of his trial, the District Court's policy regarding virtual hearings was to send to all parties and witnesses, via e-mail, an explanation of the procedure for attending virtual hearings as well as a link to the proceedings, which they could disseminate to the public. The defendant's argument that nothing in the record shows that he or members of the public actually knew of this policy is unavailing because the defendant has the burden of proving that the public was excluded from his trial, see Cohen (No. 1), 456 Mass. at 107, and that the public may not have known how to attend virtually the defendant's trial is not proof that they were excluded, see id. at 108, quoting United States v. Al-Smadi, 15 F.3d 153, 154 (10th Cir. 1994) ("It has been stated that a defendant's right to a public trial is not denied absent 'some affirmative act by the trial court meant to exclude persons from the courtroom'").

Second, as with his other claims, the defendant does not argue that he was actually prejudiced by the purported exclusion of the public from his trial. See LaChance, 469 Mass. at 857; Randolph, 438 Mass. at 298.

d. Effective assistance of counsel. A criminal defendant is guaranteed the right to effective assistance of counsel by both the Sixth Amendment and art. 12. See Strickland v. Washington, 466 U.S. 668, 684, 686 (1984); Vazquez Diaz, 487

Mass. at 354. Although he did not raise this issue at trial, the defendant now contends that he was denied effective assistance of counsel because he "could not participate in the trial (except to observe)" and "could not discuss the trial with his attorney" because "they were in different locations." Here, too, we discern no substantial risk of a miscarriage of justice. See Francis, 485 Mass. at 106; Valentin, 470 Mass. at 189. See also Randolph, 438 Mass. at 295-296 (substantial risk standard of review applies even where failure to preserve issue may stem from ineffective assistance of counsel).

The defendant could have requested that his trial counsel move to the court's "Zoom room" so that the defendant and his counsel could communicate privately during the proceedings. See Vazquez Diaz, 487 Mass. at 354-356 (rejecting ineffective assistance of counsel claim in similar circumstances). See also Guerin v. Commonwealth, 339 Mass. 731, 733, 735 (1959) (rejecting ineffective assistance of counsel claim where defendant was seated apart from counsel but could have asked judge during trial for permission to speak with counsel). Further, the defendant has identified no error that occurred during his trial at all, much less one that might have been mitigated had he been physically adjacent to his trial counsel. See Randolph, 438 Mass. at 298.

e. Colloquy. The defendant additionally argues that he was deprived of a colloquy informing him of the constitutional rights that he might have been waiving by agreeing to a virtual bench trial. Cf. Ciummei v. Commonwealth, 378 Mass. 504, 506-507 (1979) (adequate colloquy required prior to guilty plea). This argument assumes that a defendant's constitutional rights are compromised during a virtual bench trial. We have not made such a determination previously, and because the defendant's constitutional claims are unpreserved, we do not have occasion to do so here.

2. Guidelines. Although we conclude that the format of the defendant's virtual bench trial did not create a substantial risk of a miscarriage of justice, we nevertheless recognize that a criminal defendant's constitutional rights may be implicated when critical stages of court proceedings are conducted remotely. See Vazquez Diaz, 487 Mass. at 341, 347. Accordingly, we use this opportunity to provide guidance to trial courts that offer defendants the opportunity to receive virtual or partly virtual bench trials during the COVID-19 pandemic. See G. L. c. 211, § 3. As we stated in our order in this matter issued on September 29, 2021, moving forward,

"[a] judge shall obtain a defendant's assent to a virtual bench trial on the record. In so doing, the judge shall satisfy him- or herself that the defendant understands that he or she has the option of appearing in person. In addition, the judge shall explain to the defendant the

procedure to be followed during the trial, including how to communicate with counsel, and the arrangements made for witness testimony and the public's access to the proceedings. Finally, the judge shall ensure that the defendant has had an opportunity to discuss the decision to proceed with a virtual bench trial with trial counsel."

See 488 Mass. 1051. We also made clear in that order that this guidance applies only to trials conducted after September 29, 2021. See id. See also Commonwealth v. Hernandez, 481 Mass. 582, 602 (2019), quoting Commonwealth v. Dagley, 442 Mass. 713, 721 n.10 (2004), cert. denied, 544 U.S. 930 (2005) (explaining that when we announce "a new rule in the exercise of our superintendence power," we freely may "determine whether it should be applied only prospectively").

Conclusion. For the foregoing reasons, we issued an order on September 29, 2021, affirming the judgment.